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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 915

FEDERAL POWER COMMISSION,
Petitioner,

v.

METROPOLITAN EDISON COMPANY, NORTHERN PENNSYLVANIA POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ERIE LIGHTING COMPANY, THE CLARION RIVER POWER COMPANY and SOLAR ELECTRIC COMPANY,
Respondents.

Respondents' Reply to Motion of Federal Power Commission to Shorten Time for Filing Brief and to Advance Case for Argument

WALTER BIDDLE SAUL,
Packard Building,
Philadelphia, Pa.,
Counsel for Respondents.

TRAVIS, BROWNBACK & PAXSON,
61 Broadway, New York City,

SAUL, EWING, REMICK & SAUL,
Packard Building,
Philadelphia, Pa.;
Of Counsel.

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The respondents, METROPOLITAN EDISON COMPANY, NORTHERN PENNSYLVANIA POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ERIE LIGHTING COMPANY, THE CLARION RIVER POWER COMPANY and SOLAR ELECTRIC COMPANY, file the following answer to the motion of the FEDERAL POWER COMMISSION (hereinafter called the "Commission"), seeking that the time for respondents to file their brief in answer to the Commission's petition for the issuance of a

writ of certiorari be shortened, and that the case be advanced for argument on Monday, May 2, 1938:

1. The cause did not arise in the manner set forth in the motion. Hearings in the course of the Commission's investigation, referred to in said motion made on its behalf by the Solicitor-General, had been *adjourned by the Commission without day* well prior to the institution by the respondents of the proceedings in the Circuit Court of Appeals, and were *not* the subject of the proceedings in that Court. The particular issue before the court below, the decision on which is the subject of the petition for a writ of certiorari in this case, was the right of the Circuit Court of Appeals to protect its general appellate jurisdiction over Commission orders vested in it by the Federal Power Act and whether such jurisdiction was being destroyed by certain Commission action.

2. The issue below was raised by a petition of the respondents to the Circuit Court of Appeals which showed that the respondents were attempting to pursue their administrative remedy provided for in the Federal Power Act against a certain order of the Commission, but that such administrative remedy was being frustrated and the appellate jurisdiction of the Circuit Court of Appeals was being destroyed by the Commission's refusal to follow the administrative procedure laid down by the Act.

3. The record of the proceedings before the Commission was and is the best evidence of its conduct complained of. This record was made on a rehearing granted by the Commission on a Petition for Rehearing filed by respondents with it with respect to an order made by it. The Federal Power Act requires as a prerequisite to a review by the Circuit Court of Appeals of an order of the

Commission that such a Petition for Rehearing thereon be filed with the Commission.

4. At the hearing in the Circuit Court of Appeals on the return day of the Rule issued to the Commission to show cause why it should not be restrained from proceeding in such manner as destroyed both respondents' administrative remedy and their ultimate right of appeal provided by the Act of Congress, the respondents offered in evidence the record that had been made before the Commission, which contained the testimony taken before the Commission, the rulings of the Examiner on behalf of the Commission, the rulings of the Commission on the questions of procedure, and the statements by counsel for the Commission of what the Commission proposed to do upon the hearings.

5. When that record was offered in evidence, its admission in evidence was objected to by counsel for the Commission, but, after extended argument, the Commission's objections were overruled and the record was admitted in evidence by the Circuit Court of Appeals. The judgment of the Circuit Court of Appeals affirmatively shows that it was on the basis of this record that its decision was made.

6. The Clerk of the Circuit Court of Appeals for the Third Circuit, in certifying to the Clerk of this Court the record of the court below, included therein the record made before the Commission, which, as above set forth, had been duly offered, and admitted in evidence by the Circuit Court of Appeals.

7. The Commission has failed to print that record; and in the motion filed in this Court, to which this is

a reply, it is stated: "* * * the testimony before the Commission was not part of the record in the Circuit Court of Appeals and therefore is not part of the record in this Court or required to be printed as such." *Your respondents respectfully but firmly aver that that statement in the Commission's motion is not correct.*

8. Respondents have annexed hereto as Exhibit A and made a part hereof a certificate of the Circuit Court of Appeals, dated April 23, 1938, setting forth that the record of proceedings before the Federal Power Commission was admitted in evidence by the Circuit Court of Appeals, and was considered by the Court in its order.

9. Whether the order of the Circuit Court of Appeals should or should not be sustained depends upon a consideration of the record which was in evidence before that Court, and upon the question of whether or not that record shows that the course of proceeding by the Commission therein disclosed had the effect of destroying the respondents' administrative remedy before the Commission, and of destroying and making moot the appellate jurisdiction of the Circuit Court of Appeals vested in it by the Federal Power Act.

10. Prior to the filing of their petition, verified April 20, 1938, and supported by affidavits, requesting an extension of time to answer the Commission's petition for certiorari (to which respondents refer for the reasons for such extension), respondents, through their counsel, communicated with the General Counsel for the Commission, Oswald Ryan, Esq. and its Assistant General Counsel, William C. Koplovitz, Esq., in order that the question of the content of the record might be settled by a proper

stipulation. Mr. Ryan agreed that the record before the Commission had been offered in evidence at the hearing before the Circuit Court of Appeals and that the consideration of that record was essential in so far as the determination of the rights of the respondents were concerned. Mr. Ryan stated, however, that the matter was in the hands of the Solicitor-General's office. Mr. Koplovitz stated that he would take up the matter with the Solicitor-General's office so that a proper stipulation might be agreed upon. Counsel for the respondents had theretofore called to the attention of the Solicitor-General's office the fact that the record was incomplete. After the conference with Messrs. Ryan and Koplovitz, counsel for respondents wrote to Mr. Cooper, in charge of the matter in the Solicitor-General's office, a letter dated April 21, 1938. Copies of said letter and of the Solicitor-General's telegraphic reply thereto received on April 22, 1938, are annexed hereto as Exhibits B and C hereof.

11. Respondents deny the averments in the Commission's motion with respect to the public importance or gravity of the decision of the Court below; deny the assertion that its effect is unsettling upon the principles governing the review of administrative action; deny that such decision results in any confusion or otherwise materially interferes with the administration of the Federal Power Act; and deny that the decision below jeopardizes in any way the progress of any investigation properly undertaken by the Commission. Respondents have confined themselves herein to this brief denial because these are matters which are not before this Honorable Court on the instant motion, but are only properly raised by the petition for

certiorari. They will be discussed and fully answered in respondents' brief in answer to the petition for such writ.

12. Respondents deny that their petition for an extension of time to file an answering brief was filed for the purpose of delaying an early determination by this Court or to delay proceedings before the Federal Power Commission. Respondents respectfully point out to this Court that the judgment of the court below was filed on January 27, 1938 and that it was not until April 1, 1938, more than two months thereafter, that the petition for certiorari was filed. Respondents further respectfully point out that if a proper transcript of record had been caused to be printed and filed with the petition for certiorari, there would have been no necessity to apply for additional time within which the defect in the transcript might be rectified by the Commission.

13. Respondents suggest that, in view of the facts that the record herein is still defective, and that this Honorable Court has not as yet had opportunity to exercise its discretion with respect to the Commission's petition for certiorari, nor to consider respondents' answering brief (which will point out some of the many erroneous assumptions of fact and law contained in the petition), the Commission's motion that the case be advanced for argument on Monday, May 2, 1938, is at least premature. In any event, respondents respectfully state that neither the petition for certiorari nor the Commission's motion show any facts requiring the suspension of the rules of this Court to respondents' prejudice—which the granting of such motion would entail.

14. Your respondents therefore respectfully pray that this Honorable Court dismiss the motion of the Federal Power Commission.

And your petitioners will ever pray.

METROPOLITAN EDISON COMPANY,
NORTHERN PENNSYLVANIA POWER COMPANY,
PENNSYLVANIA ELECTRIC COMPANY,
ERIE LIGHTING COMPANY,
THE CLARION RIVER POWER COMPANY,
SOLAR ELECTRIC COMPANY, Respondents,

By (Sgd.) WALTER BIDDLE SAUL,
Counsel for Respondents.

TRAVIS, BROWNBACK & PAXSON,
SAUL, EWING, REMICK & SAUL,
Of Counsel.

Commonwealth of Pennsylvania }
County of Philadelphia } ss.:

WALTER BIDDLE SAUL, being duly sworn, deposes and says: that he is an attorney at law, admitted to the bar of the Supreme Court of the United States; that he is counsel for the respondents herein; that he has read the foregoing answer of the respondents and knows the contents thereof; and that the same are true to the best of his knowledge and belief.

(Sgd.) WALTER BIDDLE SAUL

Sworn to before me this 23rd }
day of April, 1938. }

(Sgd.) L. C. STURTEVANT
Notary Public
My Commission Expires Feb. 26, 1939

(NOTARIAL SEAL)

Exhibit A

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

FEDERAL POWER COMMISSION, PETITIONER

v.

METROPOLITAN EDISON COMPANY, NORTHERN PENNSYLVANIA POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ERIE LIGHTING COMPANY, THE CLARION RIVER POWER COMPANY, and SOLAR ELECTRIC COMPANY

Certificate

AND NOW, to wit, April 23, 1938, upon motion of Walter Biddle Saul, counsel for the respondents, the Circuit Court of Appeals of the United States for the Third Circuit, hereby certifies that the record of the hearings before the Federal Power Commission were offered in evidence before this court and admitted in evidence and the said record was considered by this court in the order which it made in disposing of the petition of the Metropolitan Edison Company, et al, and the said record of the proceedings before the Federal Power Commission were certified to the United States Supreme Court by the Clerk of this court as part of the record which was before this court.

PER CURIAM
(Sgd.) BUFFINGTON
Senior Circuit Judge

Received & Filed, April 23, 1938
WM. P. ROWLAND,
Clerk

Exhibit A (Cont'd)

UNITED STATES OF AMERICA
Eastern District of Pennsylvania } Sct.
Third Judicial Circuit

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, DO HEREBY CERTIFY the foregoing to be a true and faithful copy of the original Certificate of the Court as to Record in the case of—

Metropolitan Edison Co., et al.,
Petitioners,

vs

Federal Power Commission,
Respondent

No. 6447

on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 23rd day of April, in the year of our Lord one thousand nine hundred and thirty-eight, and of the Independence of the United States the one hundred and sixty-second.

(SEAL)

(Sgd.) WM. P. ROWLAND
Clerk of the U. S. Circuit Court of Appeals,
Third Circuit.

Exhibit B

SAUL, EWING, REMICK & SAUL
2301-17 Packard Building
Philadelphia, Pa.

April 21, 1938

Dear Mr. Cooper:

In the matter of the application of the Federal Power Commission for a certiorari to the Supreme Court from the Third Circuit, I would like to have a conference with you as soon as possible, either in Philadelphia or Washington, in order to prepare a stipulation that will clear up the question of the record. On Tuesday I talked to Mr. Ryan and Mr. Koplovitz, and they agreed with me that the testimony that had been taken before the Federal Power Commission had been offered in evidence in the Circuit Court of Appeals, admitted in evidence by the Circuit Court of Appeals and was part of the record. Mr. Ryan also agreed with me (Mr. Koplovitz not having been in the case at that time) that a consideration of that testimony was essential to the proper presentation of the case. Mr. Banigan and I suggested a stipulation in event that your department still feels that for the time being it did not desire to spend the money for printing of the record, that would provide:

1. A definite agreement that the testimony now filed with the Clerk of the United States Supreme Court was part of the record and was to be considered by the court in passing on the petition for a certiorari.

2. That in any answer and/or brief that the respondents desire to file this testimony could be referred to as though it had been printed.

3. That in event the Supreme Court granted a writ of certiorari the government would print the testimony as part of the record so it would be available in convenient form for the use of the court on the argument.

As the court granted only an additional ten days to file our answer to the petition and as our answer must be printed, I would appreciate it if you would let me know when I could talk the matter over with you so that the stipulation could be put in form and signed in time to permit the respondents to file their answer and brief before the expiration of the ten day period.

Very truly yours,

(Sgd.) WALTER BIDDLE SAUL.

WBS:S

Department of Justice
Washington, D. C.

Exhibit C

RECEIPT ACKNOWLEDGED YOUR LETTER ADDRESSED TO MR. COOPER. SEE NO OCCASION FOR CONFERENCE WHICH YOU SUGGEST PARTICULARLY IN VIEW OF REPRESENTATION WHICH YOU HAVE MADE TO THE COURT IN APPLICATION FOR EXTENSION OF TIME. WITH RESPECT TO YOUR FIRST PROPOSITION THE ANSWER IS NO. WITH RESPECT TO YOUR SECOND PROPOSITION THE DEPARTMENT HAS LONG SINCE INDICATED THAT THEY WOULD BE WILLING TO ENTER INTO SUCH A STIPULATION. WITH RESPECT TO YOUR THIRTY [THIRD] PROPOSITION THE ANSWER IS NO.

(Sgd.) ROBERT H. JACKSON
SOLICITOR-GENERAL